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October Term, 1963

No. [redacted] 64

CIVIL

THE MICHIGAN NATIONAL BANK, PETITIONER,

V.

ELVIN E. HILLS and MARGIE HILLS, RESPONDENTS.

RESPONDENTS' BRIEF IN RESISTANCE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This cause is before this Court on the petition of The Michigan National Bank for a Writ of Certiorari to the Supreme Court of Nebraska. The action was commenced in the District Court of Lancaster County, Nebraska, by the respondents, Elvin E. Hills and Margie Hills, based upon a note and conditional sales contract given in connection with their purchase of a house

trailer, which instruments were void because taken in violation of the Nebraska Installment Loan Act. The violation consisted of contracting for usurious interest and failure to comply with other provisions of the Act. The contract was entered into between the respondents and Earl M. Burnett, Sr., doing business as Burnett's Home Trailer Sales. The note and mortgage were then assigned to the Michigan National Bank by the said Burnett.

The petition prayed for a determination that the note and contract were void, judgment for the amount of money already paid on the contract, and an order that petitioner deliver to respondents the certificate of title to the trailer free and clear of all incumbrances, costs and equitable relief. The Michigan National Bank was made a defendant together with the dealer and other interested parties.

On trial the District Court held generally for the plaintiffs, respondents herein, and against the petitioner and other defendants. It declared the note and contract void, entered a money judgment against the petitioner and other defendants, and ordered petitioner to deliver to respondents the certificate of title.

On appeal to the Supreme Court of Nebraska that Court sustained the judgment of the lower court in a written opinion reported in 172 Neb. 370, 109 N. W. 2d 739.

Petitioner challenges the jurisdiction of the Nebraska Courts in this action on the grounds that Title 12, Section 94 of the United States Code establishes the venue.

QUESTIONS PRESENTED

1. Does Title 12, Section 94 of the United States Code govern actions which are local in character?

2. Where the parties to a contract, entered into in the State of Nebraska, agree that such contract shall be governed by the laws of Nebraska, and Nebraska law places the venue of an action with reference to such contract in the courts of Lancaster County, Nebraska, can a National Bank which purchases such contract, when sued thereon, successfully contend that the venue of such action is in the Federal Courts of a sister state?

3. When a National Bank enters into and does business in a state other than the state where it is established and purchases a contract, entered into between residents of such sister state, which contract is void from its inception, can the federal law relating to National Banks supercede the laws of the state under which the contract was negotiated?

ARGUMENT

Petitioner bases its right to a review on Writ of Certiorari on the ground that Title 12, Section 94 of the United States Code limits the venue of *all* actions against a National bank to the City or County where the bank is located. In considering the merits of this contention it becomes necessary to first determine the character of the transaction involved.

The note and conditional sales contract which are the basis of this action do not represent a loan made by petitioner to respondents in the course of its banking business. These instruments evidence a loan made to

respondents by a third party, namely, Earl M. Burnett, Sr., doing business as Burnett's Home Trailer Sales, in violation of the Nebraska Installment Loan Law which loan, under Nebraska law, was void from its inception. The contract contained an express stipulation that:

> "It is the intention of the parties hereto that all matters relating to the execution, interpretation, validity and performance of this contract shall be governed by the laws of the state in which the Buyer resides, which is the state indicated below."
>
> "Residence of Buyer - - Lincoln, Nebraska."

The cause of action herein is local in nature and arose in Lancaster County, Nebraska (the County in which the City of Lincoln is located). By the provisions of Section 25-404, Reissue Revised Statutes of Nebraska 1943, the action must therefore, be brought in Lancaster County, Nebraska. This Section, so far as pertinent here, provides as follows:

> "Actions for the following causes must be brought in the County where the cause or some part thereof arose: (1) An action for the recovery of a fine, *forfeiture*, or penalty, imposed by a statute; - - - -" (Emphasis Supplied)

That this is the type of action included in the language of Section 25-404 was established by the Supreme Court of Nebraska in *McNish* v. *General Credit Corp.*, 164 Neb. 526, 83 N. W. 2d 1. That case was based on a loan made in violation of the installment loan law, the same as the instant case, and the Court expressly held that such action involved a forfeiture. The opinion states:

> "- - - - while the action is in practical effect punitive as to the lender, *it is in fact a forfeiture* sus-

> tained by him in failing to comply with applicable usury statutes which void the usurious contract and provide that he shall forfeit principal, interest, and charges for so doing." (Emphasis Supplied)

This existing law became a part of the contract between the parties and the assignment to petitioner cannot alter, vary, or negative these terms. Neither can such assignment breathe life into the contract, void from its inception, so as to invoke the usury laws applicable to loans made by National banks and permit collection either in whole or in part. As stated by Chief Justice Simmons in the opinion of the Nebraska Court, *Hills* v. *Burnett*, 172 Neb. 370, 109 N. W. 2d 739:

> "Any other rule would open a wide door for the complete defeat of the Installment Loan Act and the public policy it serves. Any person, licensed or non-licensed, could then avoid the inhibitions and prohibitions of the act by the simple device of selling the void securties to a National bank."

This Court has previously considered the question here presented by petitioner in the case of *Casey* v. *Adams*, 102 U. S. 66, 26 L. ed. 52, and has ruled adversely to petitioner's contention. After setting out the language of Section 5198, Rev. Stat., which is now Title 12, Section 94, United States Code, this Court said:

> "*This we think, relates to transitory actions only, and not to such actions as are by law local in their character.*" (Emphasis Supplied)

CONCLUSION

The federal question presented by petitioner has been previously determined by this Court and the decision of the Nebraska Court is in accord with such determination. No question is therefore presented

which will justify the granting of a Writ of Certiorari herein.

Respectfully submitted,

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PROOF OF SERVICE

I, Robert A. Nelson, one of the attorneys for respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on February 14, 1962, I served copies of the foregoing Brief in Resistance to Petitioner's Petition for Writ of Certiorari to the Supreme Court of Nebraska upon respondents by depositing the same in a United States mail box, with first class postage prepaid, addressed to Mr. Thomas M. Davis, 824 Sharp Building, Lincoln, Nebraska and Robert A. Barlow and Patrick W. Healey, 1521 Sharp Building, Lincoln, Nebraska, such being the post office addresses of said counsel of record for the petitioner.

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